Office - Supreme Court, U.S.
FILED
NOV 14 1986
ALEXANDER L. STEVAS
CLERK

No. 83-591

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

HONORABLE DONALD E. DALTON; HONORABLE DAVID DALTON; HONORABLE FRED RUSH; HONORABLE CHARLES R. SCHROEDER; HONORABLE WILLIAM T. LOHMAR; HONORABLE RICHARD ZERR; and HONORABLE KATHIE GUYTON,

Petitioners,

VS.

R.W.T., K.M.R., and T.S.C. and HONORABLE PAUL WILLIAM; HONORABLE CHARLES SCHWENDEMANN; HONORABLE PEGGY COPPAGE; HONORABLE DONALD BOEHMER; GUY L. KOESTER, Sheriff; CLISTON HILTON, Sheriff; DAVE JENKINS, Sheriff; RAYMOND J. GRUSH, Juvenile Officer; and GERALD W. PAUL, Deputy Juvenile Officer,

Respondents.

On Petition For Writ Of Certiorari To The United States Court of Appeals for the Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

DAVID C. HOWARD
ADRIENNE E. VOLENIK
304A North Euclid
Maryland Plaza
St. Louis, Missouri 63108
(314) 454-1722

(Additional Attorneys listed inside front cover)

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

MICHAEL FERRY
STANLEY J. EICHNER
Legal Services of Eastern
Missouri, Inc.
Post Office Box 4999-A, Field Station
625 North Euclid
St. Louis, Missouri 63108
(314) 454-6860

Attorneys for Respondents

QUESTIONS PRESENTED BY PETITIONERS FOR REVIEW

1. Are juveniles detained for reasons other than the commission of a criminal offense, entitled to the same level of constitutional protection as juveniles who are charged with the commission of an offense which, if committed by an adult, would constitute a crime?

2. Whether or not the two groups of juveniles identified in question 1 are treated the same for purposes of constitutional analysis, is either group entitled to a "hearing" on the issue of probable cause prior to their continued detention and, if so, what does this hearing entail?

3. Are members of the judiciary, acting in a judicial capacity, immune from entry of declaratory and injunctive relief and the award of attorneys' fees pursuant to 42 U.S.C. §1988?

4. Can a state court employee, consistent with the doctrine of judicial immunity, be enjoined or be the subject of an award of attorneys' fees, when the act enjoined and which forms the basis for the award of attorneys' fees is one performed pursuant to an order of a state court judge?

5. When allocating an award of attorneys' fees under 42 U.S.C. § 1988 among two groups of defendants and on two separate claims, is it permissible to base such allocation upon the relative importance of the two issues, as opposed to the amount of time reasonably expended by counsel for the prevailing party on each issue?

TABLE OF CONTENTS

	Page
Questions Presented by Petitioners for Review	i
Table of Authorities	iv
Opinion Below	1
Statement of the Case	2
Reasons Why The Writ Should Be Denied:	
I. The Questions Of Whether Probable Cause Hearings Are Required For Juveniles, Or Whether Probable Cause Determinations Are Required For Status Offenders Are Not Properly Before This Court	4
II. Assuming *Arguendo* That These Issues Are Properly Before This Court, Juveniles Who Are Arrested Without A Warrant, Denied Bail, And Detained For Extended Periods, Are Entitled To A Hearing Before A Judicial Officer To Determine The Existence Of Probable Cause To Believe That They have Committed The Offense For Which They Have Been Charged And Detained, Whether They Are Accused Status Offenders Or Accused Delinquents.	6
A. Since They Suffer the Same Liberty Deprivation as Accused Delinquents, Accused Status Offenders Should be Provided the Same Pre-Trial Constitutional Protections	7
B. The Fourth Amendment and the Due Process Clause of the Fourteenth Amendment Require that Accused Juveniles be Provided Hearings to Determine the Existence of Probable Cause	11

III. Petitioners Should Not Be Given Certiorari To Review Immunity Issues That Were Decided In Their Favor 18

IV. The District Court Awarded And The Eighth Circuit Affirmed The Correct Allocation Of Attorneys' Fees Against The Parties 20

Conclusion 25

TABLE OF AUTHORITIES

Page

Cases:

Abrams v. Martin, 51 U.S.L.W. 3756 5

Albrecht v. United States, 273 U.S. 1 (1927) 14

Anderson v. St. Louis County, 421 S.W.2d 249 (Mo. banc 1967) 22

Application of Roberts, 622 P.2d 1094 (Ore. 1981) 15

Baker v. Hamilton, 345 F.Supp. 345 (W.D.Ky. 1972)... 15

Baker v. McCollan, 443 U.S. 137 (1979) 12

Carlson v. Green, 446 U.S. 14 (1980)..... 19,20

D. B. v. Tewksbury, 545 F.Supp. 896 (D.Ore. 1982).... 15

Gagnon v. Scarpelli, 411 U.S. 778 (1973) 10

Gerstein v. Pugh, 420 U.S. 103 (1975) 8,12,13,14,15,16

Guggenheim v. Mucci, 32 N.Y.2d 307, 298 N.E.2d 109, 344 N.Y.S.2d 944 (1973) 5

Hensley v. Eckerhart, 103 S.Ct. 1933 (1983) 20

Heryford v. Parker, 396 F.2d 393 (10th Cir. 1968) 10

Hormel v. Helvering, 312 U.S. 552 (1941) 4,5

In re Gault, 387 U.S. 1 (1967) 9,10,15

Kent v. United States, 383 U.S. 541 (1966) 15

Martin v. Strasberg, 689 F.2d 365 (2nd Cir. 1982) 5

Morrissey v. Brewer, 408 U.S. 471 (1972) 10

Moss v. Weaver, 525 F.2d 1258 (5th Cir. 1976) 15,17

Perez v. Ledesma, 401 U.S. 82 (1971) 19

Public Service Commission of Missouri, v. Brashear Freight Lines, Inc., 306 U.S. 204 (1939)..... 19

R.W.T. v. Dalton, 712 F.2d 1225 (8th Cir. 1983) 1,5,7,9,24

Schall v. Martin, 51 U.S.L.W. 3756 5

Singleton v. Wulff, 428 U.S. 106 (1976) 5

Swansey v. Elrod, 386 F.Supp. 1138 (N.D.Ill. 1975)..... 15

Turner v. City of Memphis, 369 U.S. 350 (1962) 5

United States v. Ortiz, 422 U.S. 891 (1975)..... 20

Statutes:

Fla. Stat. Ann. §39.032(2)(7)(Supp. 1982) 17

Mo. Ann. Stat. §211.011 22,23

Mo. Ann. Stat. §211.021 22

Mo. Ann. Stat. §211.031.1(1)..... 9

Mo. Ann. Stat. §211.031.1(2)..... 7

Mo. Ann. Stat. §211.151.1 8

Mo. Ann. Stat. §211.181.2(2)(a)(Vernon 1983) 8

Mo. Ann. Stat. §211.311 23

Mo. Ann. Stat. §211.331 22

Mo. Ann. Stat. §211.341(2) 22,23

Mo. Ann. Stat. §211.351 19

Mo. Ann. Stat. §211.401.2 19

Court Rules:

Mo. Sup. Ct. R. 21.05 12

Mo. Sup. Ct. R. 21.11 12

Mo. Sup. Ct. R. 22.03 12

Mo. Sup. Ct. R. 22.06 12

Mo. Sup. Ct. R. 21.07(c) 12

Mo. Sup. Ct. R. 111.03 8,21

Mo. Sup. Ct. R. 111.04 19

Mo. Sup. Ct. R. 111.07 16

Mo. Sup. Ct. R. 111.08 19

Mo. Sup. Ct. R. 113.04 19

Miscellaneous:

New York Family Court Act, codified at book 29A, Part I, Judiciary Court Acts §739(b) (McKinney 1975, Supp. 1982) 6

Supreme Court Rules Governing the Missouri Bar and Judiciary Rule 4, DR 7-103(A) 12

ABA & Inst. Jud. Admin. Juv. Just. Standards Proj. Pretrial Ct.P. §4.1 and Interim Status §7.6 (Ballinger, 1980) 17

No. 83-591

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

HONORABLE DONALD E. DALTON; HONORABLE DAVID DALTON; HONORABLE FRED RUSH; HONORABLE CHARLES R. SCHROEDER; HONORABLE WILLIAM T. LOHMAR; HONORABLE RICHARD ZERR; and HONORABLE KATHIE GUYTON,

Petitioners,

VS.

R.W.T., K.M.R., and T.S.C. and HONORABLE PAUL WILLIAM; HONORABLE CHARLES SCHWENDEMANN; HONORABLE PEGGY COPPAGE; HONORABLE DONALD BOEHMER; GUY L. KOESTER, Sheriff; CLISTON HILTON, Sheriff; DAVE JENKINS, Sheriff; RAYMOND J. GRUSH, Juvenile Officer; and GERALD W. PAUL, Deputy Juvenile Officer,

Respondents.

On Petition For Writ Of Certiorari To The United States Court of Appeals for the Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

OPINION BELOW

The October 14, 1980 order and memorandum opinion of the district court are unreported but are reprinted in the petition for certiorari at Appendix A. The district court's order of May 18, 1982 is reported: *R.W.T.* v. *Dalton*, 540 F. Supp. 772 (E.D. Mo. 1982). The Eighth Circuit's opinion, styled the same as in the district court, was filed July 11, 1983 and is published at 712 F. 2d 1225.

STATEMENT OF THE CASE

On September 6, 1978, this action was filed to remedy the practice in the Eleventh Judicial Circuit of the State of Missouri (the counties of Pike, Lincoln and St. Charles) of detaining juveniles in custody without a preliminary probable cause determination by a neutral judicial officer and under allegedly unconstitutional conditions of confinement. The original plaintiff, R.W.T., was a juvenile suing on behalf of himself and the class of juveniles who were or would be detained by juvenile authorities of the Eleventh Judicial Circuit. The defendants included the Circuit judges and Associate Circuit judges of the Eleventh Judicial Circuit, the juvenile officer and deputy juvenile officer of the Circuit, the sheriffs of Pike, Lincoln, and St. Charles Counties, the director of the Missouri Department of Public Safety, the director of the Missouri Counsel on Criminal Justice, and the Administrative County Court judges of St. Charles County.

On December 1, 1978, two additional juveniles, K.M.R. and T.S.C., filed a complaint-in-intervention. The plaintiffs sought declaratory and injunctive relief pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 1343. The district court certified the case as a class action by order dated December 29, 1978.

On April 21, 1980, plaintiffs filed a motion for partial summary judgment on the issue of whether juveniles were entitled to probable cause determinations prior to detention. This motion was denied by the district court on May 6, 1980.

The case was set for trial on May 12, 1980. On May 13th, the parties reached tentative accord regarding most of the jail conditions issues. Since it had never been used to incarcerate children, partial summary judgment was granted dismissing the Pike County jail from the suit on May 30, 1980. On July 30, 1980, a Consent Judgment was entered which prohibited the incarceration of juveniles in the St. Charles County Jail and Pike County Jail.

On July 2, and July 8, 1980, cross motions for summary judgment were submitted on the issue of whether juveniles were entitled to probable cause determinations prior to extended detention. On October 14, 1980, the district court granted plaintiffs' motion for summary judgment in part and denied defendants' motion for summary judgment. The order stated that a final judgment would be entered following resolution of the question of attorneys' fees, which had previously been requested by plaintiffs.

On November 7, 1980, the Missouri Attorney General entered a limited appearance on behalf of the Circuit Judges and Associate Circuit Judges of the Eleventh Judicial Circuit, and filed a motion to reconsider the order of October 14, 1980 with respect to the probable cause issue. This motion to reconsider was denied on March 26, 1981, at which time the issue of attorneys' fees was referred to United States Magistrate David D. Noce. Magistrate Noce filed his report and recommendation on the attorneys' fees question on September 15, 1981. On March 30, 1982, the district court issued an order awarding attorneys' fees to plaintiffs' counsel and allocating payment responsibility for the award of fees. On April 8, 1982, the Attorney General filed a motion to alter or amend the order of March 30, 1982. This motion was denied by the district court on May 18, 1982.

On June 15, 1982 the circuit judges and associate circuit judges (petitioners herein) filed a notice of appeal to the United States Court of Appeals for the Eighth Circuit. A cross-appeal was latter filed by the plaintiffs. On July 11, 1983, the Court of Appeals issued its opinion affirming the district court's ruling that probable cause hearings are required for juveniles prior to extended stays in detention. Although it reversed the district court's grant of equitable relief against the circuit judges and associate circuit judges, it affirmed the district court's injunction against the juvenile officer for the Eleventh Judicial Circuit. The appellate court likewise affirmed the award of attorneys' fees against the state and local defendants. The court also reversed in favor of plaintiffs on two issues raised in their cross-appeal.

REASONS WHY THE WRIT SHOULD BE DENIED

I

The Questions Of Whether Probable Cause Hearings Are Required For Juveniles, Or Whether Probable Cause Determinations Are Required For Status Offenders Are Not Properly Before This Court.

Petitioners seek certiorari to challenge *inter alia* the Eighth Circuit's affirmance of the district court's decision requiring a prompt, preliminary hearing to determine the existence of probable cause to believe that a suspect child has committed the offense for which he has been charged and detained. This issue, however, was not presented to the Eighth Circuit on appeal. It is raised for the first time here in the petition for certiorari. Indeed, in their Reply/Answer Brief in the Eighth Circuit at 4-5, petitioners themselves dispelled any misconceptions to the contrary:

> Similarly, the brief filed by the plaintiffs indicates a misunderstanding of the precise issues being raised by the judicial defendants. The plaintiffs go through an extended analysis of cases on probable cause all for the purposes of establishing that [district court] Judge Filippine's order was correct as to the law. *At no point in the brief of the judicial defendants was it asserted that the legal conclusion was erroneous.* The issue being raised is not whether juveniles accused of crime are entitled to a probable cause determination but whether the named plaintiffs themselves [status offenders] were entitled to this protection. (Emphasis added.)

Now, petitioners present the question *ab initio* regarding whether hearings are constitutionally required to determine probable cause, without having preserved or developed this question in the lower courts. Ordinarily an appellate court does not give consideration to issues not raised below. *Hormel* v. *Helver-*

ing, 312 U.S. 552, 556 (1941). While there may be particular cases or exceptional circumstances which will prompt a reviewing court, where injustice might otherwise result, to consider legal issues which "were neither pressed nor passed upon by the court...below," *Id.* at 557, this is not such a case. Moreover, the instant case does not present special circumstances in which a federal appellate court would be justified in resolving an issue not raised in the court below, as where proper resolution is beyond any doubt. *See Turner* v. *City of Memphis*, 369 U.S. 350 (1962).

Likewise, as the Eighth Circuit noted, the petitioners never argued in the district court "that status offenders should be treated differently from juveniles charged with violations of the criminal law." *R.W.T.* v. *Dalton*, 712 F. 2d 1225, 1232 (8th Cir. 1983), (Appendix D of Petition at A-34). Furthermore, the state never objected to the December 29, 1978 class certification order by the district court finding the status offender respondents to be proper representatives of a class of juveniles composed of "all who have been, are now or may be detained...without a determination of probable cause." *Id.* at 1232. Petitioners neither sought to decertify the plaintiff class in the district court nor claimed error regarding that order in the appellate court. *Id.* at 1232. Respondent juveniles, not being apprised of the existence of this issue until the appeal was taken, had no opportunity to offer relevant evidence on this issue. *See Singleton* v. *Wulff*, 428 U.S. 106, 120 (1976).

Assuming *arguendo* that the hearing versus *ex parte* determination of probable cause question is properly before this Court, respondents submit (see discussion *infra*) that this issue has long since been resolved. In their Argument at 19, petitioners cite *Martin* v. *Strasberg*, 689 F. 2d 365 (2nd Cir. 1982), *probable jurisdiction noted sub nom. Schall* v. *Martin* and *Abrams* v. *Martin*, 51 U.S.L.W. 3756, intimating that at least one of these cases "kappears to raise the issue of the necessity of a probable cause determination." This is patently incorrect.

Those actions deal with a specific provision of the New York Family Court Act involving preventive detention. The probable cause issue was laid to rest in New York by the passage of the New York Family Court Act, codified at Book 29A, Part I, Judiciary-Court Acts §739 (b) (McKinney 1975, Supp. 1982). This provision was enacted following the litigation in *Guggenheim* v. *Mucci*, 32 N.Y. 2d 307, 298 N.E. 2d 109, 344 N.Y.S. 2d 944 (1973), where the New York Court of Appeals indicated that prompt, probable cause hearings are basic to insuring the due process rights of juveniles.

Petitioners attempt to raise the spectre of disarray among the states so as to convince this Court to grant certiorari "to bring order to the entire field of juvenile detention." Petition at 19. The court below decided a very narrow question that falls far short of broaching issues covering the "entire field of juvenile detention." The issue petitioners seek to raise in this Court is whether juveniles who are arrested without a warrant, denied a right to bail, and detained in a jail or detention center for extended periods have a right to be taken before a judicial officer for a hearing to determine whether there exists probable cause to believe that they have committed the acts for which they have been charged.

Thus, petitioners are unsuccessfully grappling for a reason why this Court should accept certiorari. By not contesting these points until the Supreme Court level, petitioners present issues that are undeveloped and improperly before this Court.

II

Assuming *Arguendo* That These Issues Are Properly Before This Court, Juveniles Who Are Arrested Without A Warrant, Denied Bail, And Detained For Extended Periods, Are Entitled To A Hearing Before A Judicial Officer To Determine The Existence Of Probable Cause To Believe That They Have Committed The Offense For Which They Have Been Charged And Detained, Whether They Are Accused Status Offenders Or Accused Delinquents.

Prior to the district court's decision of October 14, 1980 (Appendix A of Petition), children in Missouri could be arrested and detained for extended periods at the unfettered discretion of a juvenile officer or deputy sheriff without ever appearing before a judge. Consequently, many children were mistakenly arrested or held on mere suspicion without one scintilla of evidence to connect them to any wrongdoing being presented until the trial. By that time the liberty deprivation was complete. Probable cause determinations are still not required by Missouri statute or court rule.

A. Since They Suffer The Same Liberty Deprivation As Accused Delinquents, Accused Status Offenders Should Be Provided The Same Pre-Trial Constitutional Protections.

Although petitioners did not raise the question in the district court, the only issue regarding probable cause that may properly be before this Court is the question of whether juveniles *qua* status offenders, are entitled to the same level of constitutional protection to check the reliability of the decision to detain them as are children charged with delinquent acts. It is important to note that under Missouri law, as in most states, accused status offenders are children charged with non-criminal misbehavior, *e.g.*, truancy, curfew violations, runaway, and incorrigibility.[1] These are offenses emanating from the very status of being a child. Accused delinquents in Missouri are children charged with law violations that are equally applicable to adults, including crimes such as murder, robbery and rape.

As the court below acknowledged, juveniles charged with status offenses are subjected to the same pre-trial deprivation of liberty as are juveniles charged with delinquent offenses: "both accused delinquents and accused status offenders may be put in

---

[1] *See* MO. ANN. STAT. §211.031.1(2) (Vernon 1983).

jail pending a judicial hearing on the merits of their cases." *R.W.T.* v. *Dalton*, 712 F. 2d at 1231. The liberty interest at stake is the same for both classes of juvenile suspects—incarceration against one's will. As Justice Powell recognized in *Gerstein* v. *Pugh*, 420 U.S. 103, 125, n. 26 (1975), there are many kinds of pretrial release and many degrees of conditional liberty, "but the key factor is significant restraint on liberty."

Although Missouri distinguishes the two classes of juveniles for dispositional or "sentencing" purposes,[2] there is no distinction in the pre-trial stages of the proceedings; nor is there a difference in the place or conditions of their pre-trial confinement. Accused status offenders as well as children charged with delinquency are subjected to confinement in the same designated facility pursuant to standing order[3] of the juvenile court judges.

Despite the two classes of juveniles having the identical liberty interest at stake, petitioner judges steadfastly submit that the children charged with non-criminal misbehavior should not be as well protected by constitutional safeguards as are the children charged with serious crimes. This makes no sense. As the Eighth Circuit observed below:

> It would be anomalous to afford less protection to children who are accused of acts such as running away, truancy, and the like, which do not present an immediate threat to

---

[2] *See*, MO. ANN. STAT. §211.181.2(2)(a) (Vernon 1983), which proscribes the institutional commitment of status offenders for a first offense.

[3] Mo. Sup. Ct. R. 111.03 (West 14th ed. 1983), authorizes that each juvenile court in the state shall by order specify the detention facility or facilities to which juveniles shall be taken when they are within judicial custody, including adult jails. The purpose of the order is to provide guidance and direction to court staff and law enforcement officials concerning where a child shall be held pending adjudication. *See also*, MO. ANN. STAT. §211.151.1 (Vernon 1983).

society, than to children who are accused of acts as murder, robbery, and rape.

Petitioners claim that the court of appeals' reasoning on this point is "extremely disingenuous," and contend that the "reason for the detention of juveniles for such reasons as truancy and running away...may be necessary for the juvenile's own welfare." Respondents do not disagree with this assertion; we merely ask that the court have a minimal probable cause safeguard to help insure for example that the authorities have identified, apprehended and detained the right child, or that a curfew violation, truancy or running away *etc.* has actually been committed.[4]

To advance their argument petitioners eschew the use of the label status "offender," arguing that a better appellation would help make procedures akin to "civil commitment proceedings" labeling juveniles "in need of care and treatment." Petitioners' Argument at 17-18. These state officials have overlooked the legislative recognition of just such a category under Missouri law: MO. ANN. STAT. §211.031.1(1) (Vernon 1983), authorizing juvenile court jurisdiction over children alleged to be "*in need of care and treatment*...or...otherwise without proper care custody or support." (Emphasis added.) As the Eighth Circuit noted, this "class of juveniles is not involved in this case." *R.W.T.* v. *Dalton,* 712 F. 2d at 1231, n. 7.

More importantly, this Court long ago buried petitioners' labeling proposition in *In re Gault,* 387 U.S. 1, 49-50 (1967), and ruled that one must examine the substance of the process; the application of a "civil" label to juvenile proceedings is entirely unrealistic since these proceedings can lead to commit-

---

[4] One of the named plaintiffs was arrested at the child's own home—for running away from home. The provision of a prompt probable cause hearing could have easily rectified the mistake and saved the child an extended jail incarceration.

ment to a state institution and, as in the instant case, these proceedings can lead to jail confinement—alongside adult prisoners. Changing the "status offender" label or designating the juvenile court proceeding non-criminal would be to ignore the substance that "commitment is a deprivation of liberty. It is incarceration against one's will whether it is called 'criminal' or 'civil'." 387 U.S. at 50. While the Court in *Gault* was concerned with the Fifth Amendment prohibition against compelling a person to testify against himself, the reasoning of the Court is equally applicable where Fourth and Fourteenth Amendment due process considerations are at issue. *See Heryford* v. *Parker,* 396 F. 2d 393, 396 (10th Cir. 1968).

The Supreme Court has firmly established that this due process probable cause requirement applies to proceedings which "result in the loss of liberty." *Gagnon* v. *Scarpelli,* 411 U.S. 778 (1973) (probation revocation); *Morrissey* v. *Brewer,* 408 U.S. 471 (1972) (parole revocation). The Court specifically noted that parole-probation revocations mandate constitutional protection, not because they are stages in a criminal prosecution, but because they entail a "loss of liberty." *Gagnon* v. *Scarpelli,* 411 U.S. at 782. Similarly, the court in *Heryford* v. *Parker,* 396 F. 2d at 396, stated as follows:

> It matters not whether the proceedings be labeled "civil" or "criminal" or whether the subject matter be mental instability or juvenile delinquency. It is the likelihood of involuntary incarceration—whether for punishment as an adult for a crime, rehabilitation as a juvenile for delinquency, or treatment and training as a feeble-minded or mental incompetent—which commands observance of the constitutional safeguards of due process. Where, as in both proceedings for juveniles and mentally deficient persons, the state undertakes to act in *parens patriae,* it has the inescapable duty to vouchsafe due process....

Petitioners cite no authority for their radical proposition that accused status offenders should be accorded fewer constitu-

tional safeguards that accused delinquents. In view of the above-cited weight of authority against their position it is ironic that petitioners would refer to the Eighth Circuit's reasoning as "disingenuous." The undisputed fact that one of the named plaintiffs, a fourteen year-old accused status offender, was detained in an antiquated adult jail—administered primarily by inmate trustees—for periods up to twenty-seven consecutive days without ever being brought before a judicial officer should, if anything, militate in favor of **more** procedural protections, not fewer.

B. The Fourth Amendment and the Due Process Clause of the Fourteenth Amendment Require that Accused Juveniles be Provided Hearings to Determine the Existence of Probable Cause.

Unlike adults, children arrested and charged with unlawful acts in Missouri are not enitled to bail, sworn petitions or warrants by complainants or validation by attorney-prosecutors obliged to find probable cause. Prior to the district court's order of October 14, 1980, children in petitioners' circuit could be apprehended and locked up for days on mere suspicion or at the whim of a deputy sheriff, juvenile officer or detention facility operator—persons unschooled in jurisprudence—without any findings of fact by an impartial judicial officer as to the existence or lack of probable cause to believe that the children committed the acts for which they were charged. Hence, the procedures applicable to the arrest and pretrial detention of juveniles stand in sharp contrast to the procedures pertaining to adults.[5] Respondents did not seek and the Eighth Circuit did not

---

[5] In their complaint respondent juveniles claimed the disparity in pre-trial procedures between adults and juveniles constituted Fourth Amendment, due process and equal protection violations.

establish a panoply of due process protections at the probable cause stage that attend an adjudicatory hearing. Moreover, respondents do not request the same adversarial safeguards for juveniles that are concomitant with an adult's preliminary examination in Missouri.[6]

Citing *Gerstein* v. *Pugh*, 420 U.S. 103 (1975), and *Baker* v. *McCollan*,[7] 443 U.S. 137 (1979), petitioners contend that the Eighth Circuit has exceeded constitutional standards by affirming the district court's requirement of a hearing on the issue of

---

[6] An adult arrested in Missouri enjoys far greater guarantees against unlawful arrest and incarceration than do children. Under Mo. Sup. Ct. Rules 21.11, 22.06 (West 14th ed. 1983), an adult may not be detained longer than twenty hours unless a capias warrant is issued "[u]pon the filing of a complaint and a finding by the court that sufficient facts have been stated therein to show probable cause that a felony has been committed by the defendant...." Rule 22.03. A judge must also find sufficient facts to support a probable cause determination in the case of an alleged misdemeanant. Rule 21.05. The complaint must be verified by oath of the complainant or authorized by a prosecuting attorney who is ethically bound by the Disciplinary Rules of the Code of Professional Responsibility not to charge any suspect unless the prosecutor is satisfied as to the existence of probable cause. Supreme Court Rules Governing the Missouri Bar and Judiciary Rule 4, DR 7-103(A). *See Gerstein* v. *Pugh*, 420 U.S. 103, 122 n.22 (1975). Felony arrestees are, within a reasonable time, entitled to a preliminary examination replete with adversary safeguards, pursuant to Rule 22.07(c), for the purpose *inter alia* of determining the existence of probable cause. Thus, for adults charged with felonies there is a two-tiered probable cause test prior to extended restraints on their liberty. Moreover, adults, but not juveniles, are entitled to be released on bail pending trial.

[7] Unlike the adult suspect in *Baker*, respondent juveniles in Missouri were never arrested pursuant to a warrant issued by a magistrate on a showing of probable cause.

probable cause for respondent juveniles. Respondents submit that while the Court in *Gerstein* rejected the necessity of adversarial safeguards attendent to probable cause determinations, it did not foreclose the need for a hearing. Petitioners obfuscate the Court's *Gerstein* discussion (420 U.S. at 120) of the low threshold standard for determining probable cause with the nature of the proceeding involved: "By equating the requirements of the Fourth amendment for pre-trial detention with the standards for an arrest, petitioners believe that this Court has indicated that procedures for arrest warrants are all that the Constitution requires." Petitioners' Argument at 14. This reading of *Gerstein* ignores the remaining context of the decision. By holding adversary hearings were not required by the Fourth Amendment, the Supreme Court did not mutually exclude *all* hearings. Respondents assert that a proper reading of *Gerstein* and its progeny compels the conclusion that a probable cause hearing before a judicial officer is a Fourth Amendment prerequisite to continued pretrial detention, especially when there is no state warrant requirement as in the case at bar.

An examination of the precise issues facing the Supreme Court in *Gerstein* is important:

> As framed by the proceedings below, this case presents two issues: whether a person arrested and held for trial on an information is entitled to a judicial determination of probable cause *for detention*, and if so, whether the *adversary hearing* ordered by the District Court and approved by the Court of Appeals is required by the Constitution.

420 U.S. at 111 (Emphasis supplied). Justice Powell, writing for the majority, went on to hold that while a probable cause determination by a judicial officer was required under the Fourth Amendment for continued detention, such a determination need not be the product of an *adversary* hearing.[8] Clearly,

---

[8] Respondents concede that an adversary probable cause hearing is not required by the Fourth Amendment, however, this does not negate the requirement of a nonadversary proceeding at which the suspect makes an appearance before a magistrate.

however, the Supreme Court did intend a probable cause hearing procedure, even though it may be nonadversarial in nature.

The confusion in connection with the issue addressed herein is engendered by the failure of the petitioners to differentiate between the *standard* for continued pretrial detention and the *procedures* for concluding that the standard has been met. *Gerstein* never once stated that the issue of an arrest warrant alone was a sufficient *procedure* to justify continued pretrial detention. The Court merely indicated that the *standards* for arrest and continued detention were the same:

> The sole issue [to be decided] is whether there is probable cause *for detaining the arrested person* pending further proceedings. This issue can be determined reliably without an adversary hearing. *The standard is the same as that for arrest.* That standard—probable cause to believe the suspect has committed a crime—traditionally has been decided in a nonadversary proceeding on hearsay and written testimony,...

420 U.S. at 120 (Emphasis supplied.) This language clearly recognizes that while the standards for arrest and continued detention are the same, there are two different procedures for determining whether the standard has been met—the *ex parte* arrest warrant and some type of probable cause hearing.

The Court's approval of the nonadversary proceeding to determine probable cause for continued detention clearly does not condone such continued detention solely on the basis of an *ex parte* determination akin to an arrest warrant.[9] This becomes particularly important in this action since there is no arrest warrant issued for juveniles in Missouri. The core of petitioners'

---

[9] That "the prosecutor's official oath [in an information] could not furnish probable cause,..." was the essence of the holding in *Gerstein*, 420 U.S. at 117. *See also, Albrecht* v. *United States*, 273 U.S. 1, 5 (1927).

argument is that a probable cause determination by a layman juvenile officer and communicated *ex parte* to a juvenile court judge for his imprimatur is sufficient to pass constitutional muster. It is important to note that juvenile court orders authorizing continued detention entered by petitioner judges did not reflect a finding of probable cause to believe that the child has committed the offense. *See Application of Roberts,* 622 P.2d 1094, 1097-98 (Ore. 1981).

While the standards for arrest and continued detention are the same, there is at least one critical difference in the two procedures—the issuance of an arrest warrant is a summary, *ex parte* procedure affording the suspect no opportunity to rebut a clearly erroneous finding of probable cause for continued detention. Indeed, Justice Powell in *Gerstein,* commenting upon the balance between the rights of the individual and the legitimate interests of law enforcement, noted that the need to rely upon such *summary* action diminishes after the suspect is in custody:

> Once the suspect is in custody, . . . [t]here no longer is any danger that the suspect will escape or commit further crimes while the police submit their evidence to a magistrate. And, while the State's reasons for *summary* action subside, the suspect's need for a neutral determination of probable cause increases significantly.

420 U.S. at 114. (Emphasis added). Since children are entitled to a higher standard of care than is afforded adults, and since "[p]retrial detention is an onerous experience, especially for juveniles," this balance between individual rights and the interests of law enforcement tips even more heavily in favor of the child once he is in custody. *Moss* v. *Weaver,* 525 F.2d 1258, 1260 (5th Cir. 1976). *See also, In re Gault,* 387 U.S. 1 (1967); *Kent* v. *United States,* 383 U.S. 541 (1966); *D.B.* v. *Tewksbury,* 545 F.Supp. 896 (D. Ore. 1982); *Swansey* v. *Elrod,* 386 F. Supp. 1138 (N.D. Ill. 1975); *Baker* v. *Hamilton,* 345 F. Supp. 345 (W.D. Ky. 1972).

Also of import to the present issue is this Court's treatment of the practical consequences of its holding in *Gerstein:*

> Although we conclude that the Constitution does not require an adversary determination of probable cause, we recognize that state systems of criminal procedure vary widely. There is no single preferred pretrial procedure, *and the nature of the probable cause determination usually will be shaped to accord with a State's pretrial procedure viewed as a whole.* While we limit our holding to the precise requirement of the Fourth Amendment, we recognize the desirability of flexibility and experimentation by the States. It may be found desirable, for example, to make the probable cause determination at the *suspect's first appearance before a judicial officer,* [footnote and citation omitted], or the determination may be incorporated into the procedure for setting bail or fixing other conditions of pretrial release.

420 U.S. at 123-24 (Emphasis supplied). It is significant that every procedural option identified by the Court for determining probable cause to detain involves a *hearing* before a judicial officer—nowhere does the Court specifically mention the issuance of an arrest warrant, standing alone, as a satisfactory procedure for continued pretrial detention.

Following this Court's pronouncement in *Gerstein* and turning to Missouri's pretrial procedures for juveniles, it is inescapable that, "viewed as a whole," those procedures require a determination of probable cause at the detention hearing mandated by Mo. Sup. Ct. R. 111.07 (West 1983). It is readily apparent under the teaching of *Gerstein* that a determination of probable cause dovetails perfectly with Missouri's detention hearing procedure. Significantly, a determination of probable cause at the statutory detention hearing, *i.e.*, "the suspect's first appearance before a judicial officer," was specifically approved in *Gerstein*. *See* 420 U.S. at 123, n. 24.

Likewise, in *Moss* v. *Weaver,*[10] 525 F.2d 1258 (5th Cir. 1976), the Fifth Circuit, relying extensively on *Gerstein,* proceeded on the explicit assumption that probable cause to believe a child has committed an offense should be determined at a "pretrial hearing." 525 F.2d at 1260-61. The *Moss* opinion contains repeated references to such hearings. It is important to remember, however, that *Moss* and *Gerstein* dealt solely with the Fourth Amendment. Respondents' complaint implicates the Due Process Clause as well as the Fourth Amendment.

As the Eighth Circuit recognized, "requiring juvenile courts to hold probable cause hearings will not impinge on their ability to function in a "unique manner." *R. W. T.* v. *Dalton,* 712 F.2d at 1230. The court below went on to string-cite a large number of examples of decisions by courts that have acknowledged "that probable cause hearings are fundamental to juveniles' rights to due process." *Id.* (Citations omitted.) In view of the virtual unanimity in support of this procedural safeguard for juveniles among the state and federal courts and commentators[11] that have addressed this issue, and the vast majority of

---

[10] In response to the court's decision in *Moss* v. *Weaver,* 525 F.2d 1258 (5th Cir. 1976), the Florida Court Rules governing detention of juveniles were amended to require a probable cause determination. The Rules now provide that a juvenile "be given a detention hearing within 24 hours of his being taken into custody, excluding Sundays and legal holidays, to determine the existence of probable cause to believe that the child has committed such delinquent act or violation of law and the need for continued detention." FLA. STAT. ANN. §39.032(2)(7) (Supp. 1982).

[11] *See* ABA & INST. JUD. ADMIN. JUV. JUST. STANDARDS PROJ. PRETRIAL CT. §4.1 and INTERIM STATUS, §7.6 (Ballinger, 1980). Both volumes endorse the concept of a prompt, judicial finding of probable cause with adversarial safeguards; they were adopted by the ABA House of Delegates in February, 1979.

states that have codified this safeguard via statute or court rule,[12] petitioners' claim of disorder in this area of law is preposterous.

III

Petitioners Should Not Be Granted Certiorari To Review Immunity Issues That Were Decided In Their Favor.

In part II of petitioners' argument, they urge this Court to consider the question of whether "judicial officers, acting in a judicial capacity, are immune from declaratory and injunctive relief." While the district court granted such relief, the Eighth Circuit specifically reversed that holding, ruling in favor of the petitioners on the issue.

---

[12] E.g., ALASKA STAT. §47.10.140(c) (1979); ARIZ. JUV. CT. R.P. 3(b); ARK. STAT. ANN. *§45-421(d) (Supp. 1983); D.C. CODE* §16-2312(e),(f) (1981); FLA. R. JUV. P.R. 8.050(f); ILL. ANN. STAT. ch. 37, §703.6 (Smith-Hurd Supp. 1983-1984); IND. CODE ANN. §31-6-4-5(g) (Burns Supp. 1983); IOWA CODE ANN. §232.44(4) (West Supp. 1983-1984); KY. REV. STAT. §208.192(4)(a)(1982); ME. REV. STAT. ANN. tit. 15, §3203(5)(D) (1980); MISS. CODE ANN. §43-21-309(4)(a) (1981); NEB. REV. STAT. §43-256 (Supp. 1982); N.H. REV. STAT. ANN. §169-B:14 (Supp. 1981); N.J. STAT. ANN. §2A:4A-38(i) (West Supp. 1983-1984); N.M. R. P. CHILDREN'S CT. R.; N.Y. FAM. CT. ACT §307.4(7) (Family Ct. Act, Ch. 920, 1982 N.Y. Laws §1); OR. REV. STAT. §419.577(3) (1981); 42 PA. CONS. STAT. ANN. §6332 (Purdon 1982); R.I. GEN. LAWS §14-1-11 (Supp. 1982); TENN. CODE ANN. §37.214(a)(1) (Supp. 1983); WASH. REV. CODE ANN. §13.40.040(2)(a) (Supp. 1983-1984); W. VA. CODE §49-5-9(a) (Supp. 1983); WIS. STAT. ANN. §48.21(a) (West Supp. 1983-1984). In New Jersey, New Mexico, New York, Rhode Island and West Virginia, the probable cause finding need not be made at the initial detention hearing, but must be made shortly thereafter if the child is continued in custody. A variation of probable cause, *e.g.*, reasonable cause, is required in four states. CAL. JUV. CT. R. 1326(a) (prima facie case); CONN. GEN. STAT. ANN. §46b-131 (West Supp. 1983-1984); LA. CODE JUV. PRO. ANN. art. 40 (West Sp. Pamphlet 1983); N.C. GEN. STAT. §7A-574 (1981); MINN. R. JUV. P. §18.06 (5A 1983).

In essence, petitioners ask this Court to review an issue decided in their favor. For this Court to approve a petition for certiorari sought by a prevailing party is inconsistent with this Court's settled refusal to entertain appeals by parties who have been successful in obtaining final judgments in the lower courts. *See e.g., Public Service Commission of Missouri,* v. *Brashear Freight Lines, Inc.*, 306 U.S. 204, 206 (1939); *Perez* v. *Ledesma,* 401 U.S. 82, 87 (1971). Petitioners seek to cloud their status as prevailing parties on this issue by introducing two sub-issues. First, they raise a question not presented to either the district court or the Eighth Circuit: is the juvenile officer who initiates detention acting as an arm of the court and, hence, also immune to injunctive relief?[13]

While this Court is not precluded from deciding issues not presented to lower courts, it has generally been reluctant to do so unless interests of judicial administration will be served by such action. *Carlson* v. *Green,* 446 U.S. 14 (1980). Such is not the situation in the case presented to this Court.

In Missouri, the juvenile officer plays a hybrid role in the justice system. While subject to hiring and firing by the juvenile court judge, MO. ANN. STAT. §211.351 (Vernon 1983), the juvenile officer performs many functions that have traditionally been encompassed by the executive branch. It is the juvenile officer who is empowered, like any law enforcement agent, to take a child into custody. MO. ANN. STAT. 211.401.2. The juvenile officer may authorize detention, Mo. Sup. Ct. R. 111.04, and decide whether charges will be filed against the youth. Mo. Sup. Ct. R. 111.08, 113.04.

This hybrid role, established by Missouri statute and court rule, is not found in every state. Therefore the issue of the rela-

---

[13] Note that the juvenile officer has not joined in this petition for certiorari and is not represented by the Missouri Attorney General's Office.

tionship of the juvenile officer to the juvenile court judge is strictly limited to the facts of this case. In addition, this unique role serves to differentiate the juvenile officer from the clerk of the court for purposes of determining whether his or her actions can be clothed in judicial immunity. The juvenile officer must function independently of the judge in order to avoid due process violations that would occur if the judge attempted to control his or her executive branch functions. For these reasons, this issue is not the important, recurring kind such as would typically cause this Court, consistent with its decision in *Carlson* 446 U.S. at 17, n. 2, to abandon its standard rule of refusing to review those issues that have been raised for the first time pursuant to certiorari. *United States* v. *Ortiz,* 422 U.S. 891 (1975).

The second sub-issue that petitioners interject into their argument that this Court should reevaluate and affirm the Eighth Circuit's conclusion that declaratory and injunctive relief do not lie against the state circuit judges on the issue of probable cause is that of the award of attorneys' fees against the state. The petitioners contend that this is an award against the judges and hence tied to the question of immunity. The Eighth Circuit clearly implicated the juvenile officer in his official capacity in the probable cause practice complained of in the lower courts. Thus they found an award of attorneys' fees against this state employee to be appropriate.

Notwithstanding their dispute with the award of attorneys' fees in the lower courts, the petitioners do not raise this issue prior to consideration by this Court. For this reason and for the reasons stated *supra,* this Court should not address the question as raised by the petitioners.

IV

The District Awarded And The Eighth Circuit Affirmed The Correct Allocation Of Attorneys' Fees Against The Parties.

Petitioners misrepresent the application of *Hensley* v. *Eckerhart,* ____U.S.____, 103 S. Ct. 1933 (1983), when they

claim that the district court's allocation of the attorney's fee award between various defendants is in "direct contravention" of *Hensley* (Petition for Writ of Certiorari, at 32). *Hensley* dealt with the issue of proper computation of a fee award in cases in which plaintiffs prevail on some claims, but fail to prevail on other claims which are distinct and unrelated to the successful claims. This Court held that in such cases, no fee award should be made for work done on the district and unrelated claims. Since this Court ruled that the lower court had not properly evaluated the fee application, it remanded the case for redetermination and possible reduction of the award. *Id.* at 1943.

In the present case, petitioners claim to be dissatisfied not with the amount of the award, but with the allocation of liability among the losing parties. *Hensley,* however, does not deal with the issue of the allocation of responsibility for a fee award between unsuccessful defendants. It is therefore incorrect to say that the district court's allocation of the fee award is "inconsistent with" or in "direct contravention" of *Hensley*.

In an attempt to make this case somehow fit the *Hensley* mold, petitioners construct a false dichotomy among the defendants and issues: state defendants being responsible for the probable cause issue and consequent attorneys' fees; local officials being liable for the jail conditions. Petitioner state juvenile court judges seek a redetermination of liability for the fees in accord with the dichotomy. The problem with this neat division of responsiblity is that it fails to take into account the applicable state law.

The petitioner juvenile court judges and juvenile officers are just as responsible, if not more so, for the "local" jail conditions as are the sheriffs and county fiscal courts. First, the petitioner state circuit judges and their delegates are responsible for the selection and designation by standing court order of facilities for the pre-trial detention of children. Mo. Sup. Ct. R. 111.03 (West pamphlet 1983). Second, once they have designated the facility, petitioners' authority over conditions of

confinement does not subside but is codified in specific detail by the Missouri Legislature. MO. ANN. STAT. §211.011, (Vernon 1969), provides, in part, that:

> each child coming within the jurisdiction of the juvenile court shall receive such care, guidance and control, preferably in his own home, as will conduce to the child's welfare and the best interests of the state and that when such child is removed from the control of his parents the court shall secure for him care as nearly as possible equivalent to that which should have been given him by them.

To this end, the juvenile court, defined by MO. ANN. STAT. §211.021 as the juvenile division of the circuit court for the county, is authorized to order confinement of a juvenile in a jail or other adult detention facility only if his conduct makes him a menace to himself or others and he is placed in a "room or ward entirely separate from adults confined in [the same facility]." MO. ANN. STAT. §211.021. MO. ANN. STAT. §211.331, provides, in part, that:

> [t]he place of detention shall be so located and arranged that the child being detained does not come in contact, at any time or in any manner, with adults convicted or under arrest, and the care of children in detention shall approximate as closely as possible the care of children in good homes.

The same section gives the juvenile court judge the power to appoint a superintendent and other personnel necessary to operate the detention facility and to fix their salaries and maintenance.[14] Further, §211.341(2), prescribes, in part, that:

---

[14] *See Anderson* v. *St. Louis County*, 421 S.W.2d 249 (Mo. banc 1967) (county officials may not change budget estimates for the number of juvenile court employees without first obtaining consent of juvenile court).

> (c)ircuit judges of any two or more adjoining judicial circuits . . . may . . . establish one place of juvenile detention to serve their respective judicial circuits. In such event, *the circuit judges so agreeing shall jointly govern the affairs of the place of detention.* . . . (Emphasis added.)

Given the statutory framework embodied in the Missouri juvenile code, it is clear that the petitioner state juvenile court judges' duty toward a juvenile confined in an adult facility does not terminate when the judge designates a place of detention. The statutes unequivocally require that petitioners ensure that every detained juvenile have no contact with adult inmates. This was one of the primary issues regarding conditions in the trial court and the main impetus for the Consent Judgment barring the use of the two jails in question. The other conditions issue concerned the filthy, dangerous and draconian circumstances of the jails. Yet the juvenile code entitles children to care which approximates the care of children in good homes. MO. ANN. STAT. §211.011 prescribes that the foregoing provisions are to be interpreted liberally so that juveniles will receive this standard of care for the entire period they are under the jurisdiction of the juvenile court. These provisions support the proposition that the petitioner juvenile court judges must exercise continuing supervision over the conditions of confinement in juvenile detention facilities. This continuing duty to supervise conditions is also evident from the court's express power to appoint the supervisor and staff for such a facility. MO. ANN. STAT. §211.311. The power to appoint and determine salaries implies that the petitioner juvenile court judges are ultimately responsible for the actions of the officer appointed to operate the facility. The power is also evident from §211.341.(2), quoted above, which gives circuit judges who designate a joint juvenile detention facility the joint duty to govern its affairs. To hold that the juvenile judge has a continuing duty of supervision only when a joint facility is involved would require this Court to ignore the statutory admonition that the provisions be interpreted liberal-

ly. Moreover, the statutes require the juvenile judge to supervise the conditions in the juvenile detention facility on a continuing basis. Thus, it cannot be said that the petitioner state judges and the respondent juvenile officers are not liable in attorneys' fees for the conditions aspect of the case.

Even if *Hensley* was somehow relevant to the present case, it would not require reversal of the fee award. Petitioners have not contended that the juvenile respondents (plaintiffs below) failed to prevail on any claims distinct from and unrelated to their successful claims, or that they failed to achieve a level of success which would make their hours reasonably expended a satisfactory basis for making a fee award.

In addition, the fee award as allocated by the Eighth Circuit does not run against the state because of any holding against petitioners (the state court judges). The injunction against the petitioner judges was vacated. The award remains against the state because the injunction was upheld as to the juvenile officer, also a state official, but not a petitioner herein. Because the award was made against the state through the juvenile officer, it is difficult to understand how the petitioner state court judges can claim to be aggrieved.

In essence, petitioners are trying in a belated and indirect fashion to attack the amount of the award. Although they purport to complain merely of the award's allocation, their true interest is revealed in their statement, "In the instant case, there was no finding on what amount of time plaintiffs' counsel expended on the probable cause issue, *much less whether or not that amount of time was reasonable.*" Petition for Writ of Certiorarti, at 32 (emphasis added). The Eighth Circuit noted that "[t]here is no complaint on appeal that the amount of the fee award was excessive." *R.W.T.* v. *Dalton*, 712 F.2d 1225, 1234 (1983) Petitioners should not be heard to make that complaint now, directly or indirectly, by asserting that *Hensley* applies to this case.

CONCLUSION

For the foregoing reasons, respondent juveniles respectfully pray that this Court deny the petition for certiorari.

Respectfully submitted,

David C. Howard
Adrienne E. Volenik
Howard and Volenik
304A North Euclid
St. Louis, Missouri 63108
(314) 454-1722

Michael Ferry
Stanley J. Eichner
Legal Services of Eastern
Missouri, Inc.
Post Office Box 4999-A,
Field Station
625 North Euclid
St. Louis, Missouri 63108
(314) 454-6860

Attorneys for Respondents
R.W.T., K.M.R., and R.S.C.